

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Brenda Fears,

Complainant,

-
FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

v.

Seagate Technology,
Incorporated,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on November 14-21, 1996 at the Office of Administrative Hearings, 100 Washington Avenue South, Minneapolis, Minnesota. The record closed for receipt of evidence on the last day of the hearing, and closed for the receipt of argument on January 27, 1997 upon receipt of Complainant's Reply Memorandum.

Jesse Gant III, Attorney at Law, Gant Law Office, 500 Flour Exchange Building, 310 Fourth Avenue South, Minneapolis, Minnesota 55415, and Rachel B. Rosen, Brehmer & Rosen Law Firm, 5001 W. 80th Street, Bloomington, Minnesota 55437, appeared on behalf of the Complainant.

James F. Baldwin, Attorney at Law, Murnane, Conlin, White & Brandt, 1800 Piper Jaffray Plaza, 444 Cedar Street, St. Paul, Minnesota 55101, appeared on behalf of Respondent Seagate Technology, Inc.

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2 and 3, this Order is the final decision in this contested case proceeding and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

STATEMENT OF ISSUES

Whether Respondent Seagate Technology, Inc. discriminated against Complainant Brenda Fears in the terms and conditions of her employment because of her race, gender and/or disability, in violation of Minn. Stat. § 363.03, subd. 1.

Whether Respondent Seagate Technology, Inc. engaged in unlawful reprisal against Complainant Brenda Fears, in violation of Minn. Stat. § 363.03, subd. 7.

If Respondent Seagate Technology, Inc. has engaged in unfair discriminatory practices, what are the appropriate damages or other relief required by law.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Complainant Brenda Fears is an African-American female employed by Respondent Seagate as a Grade 8X Machine Operator. She began employment with Respondent approximately five years ago, on or about August 21, 1992, working part-time in the Thin Film Slider Department. She performed a number of different operations. The operation that she performed most often was a pattern verification function. Respondent's Exhibit 1(b).

2. Seagate Technology, Inc. (hereinafter also referred to as "Respondent" or "Seagate") manufactures computer disk drives and the components of computer disk drives at a facility located at 1801 Computer Boulevard, Bloomington, Minnesota. In its Thin Film Slider Department, Seagate manufactures a computer disk component known as a slider, which assists in the transfer of information to the memory disk.^[1]

3. Brenda Fears performed the pattern verification function in a clean room environment requiring the wearing of gowns and face masks. In the Fall of 1993, Brenda Fears performed this function in the Thin Film Slider Department at Station 2.

4. Employees assigned positions as Trainers work along side Grade 8X Machine Operator employees in the Thin Film Slider Department. The Trainers are paid an additional \$.40 an hour. Trainers are relied upon by unit managers to oversee and train other employees, answer questions and correct problems. They assist in the assignment of work and have responsibility for the smooth operation and efficient production in the work area.

5. A trainer named Linda Lubitz worked in the Thin Film Slider Department. On or about November 1, 1993, she assigned work to Complainant using a racial limerick. Ms. Lubitz selected Brenda Fears for a job assignment from among the other employees, using the racial limerick: "Eenie, meenie, miney, moe, catch a nigger by the toe".

6. Brenda Fears was offended by the statement and reported the incident to her manager, Dave Apold. Dave Apold spoke with Linda Lubitz shortly after Brenda Fears spoke with him. Mr. Apold directed Ms. Lubitz to not use the offensive racial limerick again. Linda Lubitz also met with Dave Apold and Carmen Shearing Walsh where she admitted using the racially offensive limerick in the workplace. At that time, Linda Lubitz was warned that she could be terminated if she used the racially offensive limerick again in the workplace. Both meetings with Linda Lubitz regarding the racially offensive

limerick, the one with Dave Apold by himself, and the joint meeting that included Dave Apold and Carmen Shearing Walsh occurred within 24 hours of the use of the racially offensive limerick by Linda Lubitz.

7. Brenda Fears was unaware and/or dissatisfied with the efforts taken to discipline Linda Lubitz. She reported the incident to Vicky Boyer, Senior Human Resources Representative at Seagate. Approximately two weeks after Linda Lubitz used the offensive racial limerick, she was given a written warning on November 18, 1993. Respondent's Exhibit 6. It took Seagate Technology approximately two and one-half weeks to issue the written warning to Linda Lubitz. The delay was caused by several reasons: middle management was uncertain how to handle this situation and the senior management official responsible for operations in the slider department was out of the country.

8. Within a week of the written warning to Linda Lubitz, Brenda Fears was reassigned to the pattern verification operation in Final Visual Area of the company where she performed the same or similar functions she performed in Station 2. The reassignment involved no change in the terms or conditions of Brenda Fears' employment.

9. In the Fall of 1993, Seagate discovered that an increasing number of customer-specific manufactured components were being shipped to the wrong customers. Seagate's engineers determined that the pattern verification function needed to be performed at a different stage in the manufacturing process. Seagate's process engineers determined that a way to prevent manufactured components being shipped to the wrong customers was to move the pattern verification function from Station 2 to the Final Visual Area, the location of final inspection before shipment to customers. On or about November 11, 1993 the entire work function performed by Ms. Fears was moved from Station 2 to the Final Visual Area. Respondent's Exhibit 45, 46 and 48.

10. After her reassignment to the Final Visual Area, Complainant Brenda Fears worked under the supervision of Conn Hemmesch, unit manager.

11. Every manufactured component is accompanied by a "traveler form". The traveler form is the written record that follows the product through the entire manufacturing process and identifies the product.

12. Approximately five months after her move to the Final Visual Area, Brenda Fears overheard a conversation between Cindy Wilson, a white female employee on loan to the Final Visual Area, and Glenda Graves, an African-American female. Ms. Wilson referred to traveler documentation accompanying a manufactured component as "nigger rigging". Both Ms. Graves and Ms. Fears were offended by the comment and it was reported to Conn Hemmesch.

13. On the same day that the complaint was brought to him, Conn Hemmesch interviewed Cindy Wilson, who admitted that she made the comment. Conn Hemmesch warned Cindy Wilson that any further use of the offensive term could result in discipline up to and including termination. On March 30, 1994, Cindy Wilson received a written warning concerning her use of the term "nigger rigging". Respondent's Exhibit 18.

14. Seagate's Employee Handbook states the company's policy on "unlawful harassment". The policy states in part as follows:

Seagate is committed to providing a work environment free of unlawful harassment. Company policy prohibits all forms of harassment, including harassment because of sex, sexual orientation, race, disability, religion, color, national origin or ancestry, age or any other basis protected by federal, state or local law, ordinance or regulation. . . . Prohibited unlawful harassment includes, but is not limited to, such unwelcome behavior as:

Verbal conduct such as epithets, derogatory comments, jokes, slurs or sexual advances, invitations or comments. . . .

The company encourages you to report any incidents of unlawful harassment forbidden by this policy immediately [Emphasis in original] whether or not you were the target of the harassment, so that complaints can be quickly and fairly resolved. Respondent's Exhibit 3, 7-8.

15. Both employees, Cindy Wilson and Linda Lubitz, were disciplined in accordance with Seagate's harassment policy.

16. Seagate transferred Brenda Fears to the Final Visual Area for the purpose of reducing or eliminating circumstances where customer-specific manufactured components were shipped to the wrong customer. Under Brenda Fears' pattern verification function manufactured components could be identified and correlated prior to the parts being shipped. Seagate engineers believed that having her function in Final Visual instead of Station 2 would help reduce the shipments of manufactured components to the wrong customers. The importance and value of the movement of her pattern verification function to the Final Visual Area may not have been adequately communicated to Brenda Fears.

17. Brenda Fears' supervisor in the Final Visual Area, Conn Hemmesch had a reputation of being a demanding supervisor, generally more demanding than other Seagate supervisors. Shortly after being transferred, Brenda Fears sought to be transferred out of Final Visual.

18. Approximately two months after Brenda Fears was reassigned to Final Visual, Conn Hemmesch became aware that three manufactured components were shipped to the wrong customers because pattern verification had not been performed. Conn Hemmesch spoke with Brenda Fears about the incorrectly identified components. Ms. Fears admitted that she failed to physically inspect and correlate with the "traveler form" any of the incorrectly identified manufactured components. After consulting with senior management, Conn Hemmesch issued Brenda Fears a written warning on February 2, 1994. Respondent Ex. 10.

19. Brenda Fears was the only employee to receive a written warning for the traveler error. The fact that she received the written warning with the tacit approval of senior management is an acknowledgment by Seagate senior management that her

role was a very important part of Seagate's efforts to prevent erroneous customer shipments.

20. Unaware of the value and importance of her pattern verification function, Brenda Fears believed that she was unfairly being assigned responsibility for the failure to correlate the manufactured components with the "traveler form". She observed that other employees in the production stream had also missed the error.

21. Brenda Fears complained to Vicky Boyer about the traveler incident explaining her belief that she was being discriminated against on the basis of race by Conn Hemmesch because other employees in the work stream also failed to catch the error and should have been written up as well.

22. Beginning in March and continuing through May 1994, Brenda Fears made numerous trips to Personnel-Human Resources to complain about the treatment she was receiving from Conn Hemmesch. She spoke repeatedly to Dick Hora, Director of Human Resources. Dick Hora responded to Brenda Fears' complaints by accompanying her to the Final Visual Area to get further details on the particular matter that she was complaining about or at other times to speak with Conn Hemmesch. Brenda Fears informed Dick Hora and other persons in the Human Resources Department that she believed that Conn Hemmesch was treating her differently, including watching her more closely than other employees in the Final Visual Area because of her race, that she was a victim of race discrimination.

23. Conn Hemmesch did watch Brenda Fears closely after the traveler incident. On or about February 28, he approached Brenda Fears concerning the submission of daily operator reports that showed the level of daily production. Daily operator reports were required to be submitted by Machine Operators. Conn Hemmesch believed that Brenda Fears' level of production was less than she reported and was less than what she was capable of doing. This was based on his close observation of her work habits, an accounting of her daily production and his view that she was outside of the work area on break more often than necessary.

24. On or about March 2, 1994, Conn Hemmesch issued to Brenda Fears a written warning regarding her performance. Respondent Ex. 13.

25. As a part of the written warning issued to Brenda Fears, Conn Hemmesch included a "Work Improvement Plan". Conn Hemmesch identified several "areas of concern", including "quality" - assuring that the correct parts are shipped to customers; "cooperation/commitment" less time away from the work area, focus and contribute to department needs and work towards meeting daily schedules regularly; and "production level" - raise her production level to a Level 3. Respondent Ex. 13.

26. Conn Hemmesch also conducted a performance appraisal on March 10, 1994, in which he concluded that Brenda Fears needed improvement along the lines previously identified in the Work Improvement Plan. The performance evaluation was done approximately seven to eight days after he issued the written warning that included the Work Improvement Plan. Respondent Ex. 15.

27. Based on his previous experience, Conn Hemmesch expected that Brenda Fears would resign from her employment rather than complete the Work Improvement

Plan. Previously, each time he put an employee on a work improvement plan the employee terminated. Therefore, he expected Brenda Fears would resign.

28. The March 10 performance appraisal gave her an overall rating of a Level 2, indicating that she was performing at less than a satisfactory level of performance.

29. Brenda Fears was issued what Conn Hemmesch identified as a "final warning" on April 11, 1994. In the warning, Conn Hemmesch indicated that Brenda Fears was not performing at satisfactory Level 3 output, that she was not helping during down-times, and was not handing in daily operator reports to assist him in his monitoring. Respondent's Exhibit 19.

30. During the period beginning in March through April and including May, Brenda Fears complained to Seagate's Human Resources Department about her treatment by Conn Hemmesch. Numerous times during this period she spoke with various persons in the Human Resources Department about her being disciplined or being judged more harshly by Conn Hemmesch. Seagate's Human Resources Department did not ignore her complaints. Various Human Resources Department employees, particularly Dick Hora, attempted to assist her with her concerns. The Human Resources Department did review Conn Hemmesch's conduct relative to the written warnings and performance improvement plan. Seagate's Human Resources Department determined that his supervisory actions were not unreasonable and that there was a basis for his disciplinary actions against Brenda Fears. Respondent's Exhibit 3.

31. A review of Respondent's Exhibits 8, 9, 12, 13, 15, 20, 28, 29, and 30, shows that Conn Hemmesch had a documentable basis for his disciplinary actions against Brenda Fears.

32. As of May 5, 1995, Brenda Fears had met and sustained the requirements of a Level 3 operator. Respondent Ex. 20. She was removed from the Work Improvement Plan. In late May, 1994, Conn Hemmesch was reassigned to another work area. At that time, Danai Kao took over the supervision of the Final Visual Area.

33. Due to headaches brought on by problems with her eyesight, Brenda Fears had difficulty performing any of the other operations using microscopes in Final Visual. No other employees in the Final Visual Area knew how to perform the pattern verification function. Brenda Fears trained in Esther Hennes, the Trainer in Final Visual, to perform pattern verification.

34. The pattern verification function in Final Visual was performed in a clean room environment. Brenda Fears complained to Conn Hemmesch concerning working in a clean room and use of a mask as required in the clean room environment. She wanted to be reassigned to another pattern verification operation that was performed outside of the clean room environment. Brenda Fears spoke with upper management about reassignment to a pattern verification operation outside of the clean room and was told that she would be reassigned to that function outside of the clean room as soon as it became available.

35. Brenda Fears converted to a full-time Grade 8X employee in the Head Gimble Assembly Department on or about April 29, 1996 under the supervision of unit managers Joanne Fleury and Roger Johnson. Respondent's Exhibit 1(b).

36. Brenda Fears' supervisors and several employees noted that she had numerous breaks away from the work area. Because of their concern regarding the number of these breaks, her supervisors required that she obtain some justification for the numerous bathroom breaks. Brenda Fears obtained and presented to her supervisors a medical note explaining her need to make frequent trips to the bathroom. Seagate has accommodated Brenda Fears' bathroom breaks consistent with notes received from her medical practitioner.

37. While under the supervision of Danai Kao, Brenda Fears developed a skin irritation resulting from the mask required to be worn in the clean room area. She reported her irritation to her supervisor who directed her to obtain a physician's note concerning the extent of her problem. After she obtained a physician's note indicating that the mask she was wearing was causing a skin irritation, Seagate accommodated Brenda Fears by offering her a spit shield and/or hypoallergenic mask. Seagate's industrial hygienist was unable to identify other options available for Brenda Fears' skin irritations. Brenda Fears was provided with the hypoallergenic mask which apparently has reduced or eliminated the skin irritation. Although Brenda Fears continues to have some skin irritations, they are treated with non-prescription remedies and creams.

38. Overtime work at Seagate is available to be performed on Friday, Saturday and Sunday beyond the normal hours of the first shift. Supervisors attempted to spread the overtime so that all employees were given an opportunity to work overtime. Weekend supervisors determined which operations would require operators for the weekend.

39. Brenda Fears sought weekend overtime opportunities. She did not receive overtime work as often as she desired. There was little call for pattern verification operators for the weekend, the function performed by Brenda Fears. The greatest amount of overtime was required in the 30-power microscope operations which Brenda Fears could not do because of headaches arising as a result of her optical problems. Respondent's Exhibit 21. Brenda Fears did receive some overtime work opportunities.

40. Brenda Fears applied for several posted employment positions at Seagate. Respondent's Exhibits 31, 55 and 56. The employees ultimately offered the positions that she applied for were not similar situated to Brenda Fears and were more qualified for the positions according to Seagate's selection criteria. Respondent's Exhibits 52, 62 and 63.

41. Seagate applies the following criteria to selection of employees for posted positions: (a) same shift employees were given preference and full-time employees were given preference over part-time (Respondent's Exhibit 34); (b) the highest performers based upon the last three performance appraisals were given preference; and (c) consideration was given to the number of years of service with the company.

42. Seagate's Human Resources Department screened applicants based upon the policy of preferences identified above.

43. Merit increases at Seagate are predetermined for each fiscal period based upon performance rating, position of the employee within the salary range for the grade level, and grade level of each employee. Respondent's Exhibits 42(a) through (3).

44. Brenda Fears believed that other employees received merit increases which were denied to her. However, the employees identified by Brenda Fears were not similarly situated to her, and merit increases received by these employees were in conformance with the Seagate policy and predetermined merit increase for the fiscal year involved. Respondent's Exhibits 39, 40, 41(a) and (b) and 53(a) through 53(h).

45. Brenda Fears took a leave of absence between August 16, 1996 and October 4, 1996. Because of her leave of absence, her merit increase for October 1996 was prorated based upon the number of pay periods she was on leave resulting in a discount of two cents an hour to her merit increase.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has authority to consider the issues raised by the Complainant's discrimination charge under Minn. Stat. §§ 363.071, subds. 1a and 2 and 14.50 (1994).

2. The Notice of and Order for Hearing was proper as to form, content and execution, and all other relevant substantive and procedural requirements of law or rule have been satisfied.

3. Respondent Seagate Technology, Inc. is an "employer" within the meaning of Minn. Stat. § 363.01, subd. 17 (1994) and Complainant Brenda Fears is an employee within the meaning of Minn. Stat. § 363.01, subd. 16 (1994).

4. The Minnesota Human Rights Act prohibits covered employers from discriminating against an employee with respect to terms, conditions or privileges of employment because of race, sex or disability. Minn. Stat. § 363.03, subd. 1(2) (1994).

5. The Complainant has the burden of proof to establish by a preponderance of the evidence that Respondent Seagate Technology, Inc. committed unfair discriminatory practices in violation of Minn. Stat. § 363.03, subd. 1.

6. The Complainant has failed to prove by a preponderance of the evidence that Respondent Seagate Technology illegally discriminated against her on the basis of race, sex or disability in violation of Minn. Stat. § 363.30, subd. 1.

7. Under Minn. Stat. § 363.03, subd. 7(1), it is an unfair discriminatory practice for an employer to intentionally engage in a reprisal against a person who opposes unfair discriminatory practices under the Minnesota Human Rights Act.

8. Complainant Brenda Fears has failed to prove by a preponderance of the evidence that Respondent engaged in unlawful reprisal.

9. These Conclusions are made for the reasons set forth in the Memorandum which follows. The Memorandum is incorporated herein by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

The charge of discrimination filed by Brenda Fears against Seagate Technology, Inc. and the Complaint initiating this contested case proceeding are DISMISSED with prejudice.

Dated this 7th day of April 1997.

ALLEN E. GILES
Administrative Law Judge

Reported: Taped (14 cassette tapes constitute the record of testimony in this proceeding)

MEMORANDUM

Introduction

This case involves alleged violations of the Minnesota Human Rights Act. Minnesota Statutes, Chapter 363 (1994) (hereinafter also referred to as the "Human Rights Act"). Complainant Brenda Fears claims that Seagate illegally discriminated against her in the terms and conditions of employment on the basis of race, sex and disability. She claims that Seagate is guilty of race discrimination because the Company failed to deal promptly and appropriately with racial slurs. She also claims that she was disciplined by Conn Hemmesch more harshly than her co-workers because of her race. She claims that Seagate failed to make reasonable accommodations to her disability arising out of her optical problems and her skin irritation due to masks she was required to wear. She alleges unlawful sex discrimination based upon her claim that she was subject to unwelcome sexual advances and comments from Conn Hemmesch. Finally, Brenda Fears claims that Seagate retaliated against her because she complained about racial slurs by transferring her to another department.

Seagate denies that it has illegally discriminated against Brenda Fears. The Company affirmatively asserts that it acted promptly and reasonably with respect to the racial slurs; that it accommodated Brenda Fears' optical and skin irritation problems; and that there was a legitimate basis for the discipline given to Ms. Fears.

Minn. Stat. § 363.03, subd. 1(c) (1994) provides as follows:

Except when based on a bona fide occupational qualification, it is an unfair employment practice:

* * *

(2) for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age

* * *

(c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

Application of Legal Standards

- In considering alleged violations of the MHRA, Minnesota courts have frequently borrowed from federal case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. ' 2000e, et seq. because of several similarities between the two statutes. For example, in analyzing whether a discriminatory employment action has occurred under the MHRA, Minnesota courts apply many of the principles articulated by the U. S. Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). See, e.g., Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978). McDonnell-Douglas provides a method of evidentiary analysis for determining discriminatory motive when a record contains no direct evidence and a trial court must rely on circumstantial evidence. See Larson, Employment Discrimination, Ch. 8, p. 8-105 (2nd Edition).

The McDonnell-Douglas approach consists of a three-step analysis. The complainant is first required to establish a prima facie case. What actually constitutes the required prima facie showing may vary from case to case, depending on the kind of employment discrimination being alleged and the particular "factual pattern and employment context". Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986). Establishment by a complainant of the required prima facie case creates a presumption of employment discrimination prohibited by Minn. Stat. ' 363.03. Although the burden of proof always remains with the complainant, the burden of producing evidence then shifts to the respondent to present evidence of some legitimate, non-discriminatory reason for its actions. Id. If the respondent comes forward with evidence of a legitimate, nondiscriminatory reason for the employment actions in question, then, in order to prevail, the complainant must prove by a preponderance of the evidence that the reasons or justification advanced by the respondent amount to a pretext for intentional discrimination. Id.

A complainant may sustain the burden of proving discriminatory intent, as required by the third step of the McDonnell-Douglas test, either directly, by adducing direct evidence of a discriminatory motive, "or indirectly by showing that the employer's proffered explanation is unworthy of credence." Sigurdson, 386 N.W.2d at 720, quoting Burdine, 450 U.S. at 255-56. The sole question in the third step is "whether or not the court is persuaded that the employee has been the victim of intentional discrimination." Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 626 (Minn. 1988).

There is no direct evidence in the record that the Respondent's personnel actions against Complainant resulted from an illegal discriminatory motive. Therefore, a discriminatory motive on the part of the Respondent, if any, must be inferable from the surrounding circumstances using the method of evidentiary analysis set out in McDonnell Douglas Corp. v. Green.

Racial Slurs

The racial limerick used by Linda Lubitz and Cindy Wilson's comment about "nigger rigging" were offensive to Brenda Fears. The Judge must determine whether the racial slurs constitute actionable race discrimination. Courts have consistently recognized that the existence of the racially offensive work environment results in an actionable Title VII claim. Walker v. Ford Motor Company, 684 F.2d 1355 (11th Cir. 1982); Johnson v. Bunny Bred Company, 646 F.2d 1250 (8th Cir. 1981). However, a principle that has also emerged is that isolated incidents of racial slurs or epithets by co-workers are not sufficient to create the kind of racially offensive environment that would constitute a violation. United States v. City of Buffalo, 457 F.Supp. 612, modified on the grounds 633 F.2d 643 (2nd Cir. 1980); Pope v. City of Hickory, 541 F.Supp. 872 (W.D.N.C. 1981), affirmed, 679 F.2d 20 (4th Cir. 1982); Powell v. Missouri State Highway & Transportation Department, 822 F.2d 798 (8th Cir. 1987); and Johnson v. Bunny Bred Company, 642 F.2d 1250 (8th Cir. 1981).

This record establishes two instances where racial slurs were used. The two instances were separated by approximately five months. Applying these facts to the case law summarized above, the Judge concludes, as a matter of law, that the racial slurs uttered by Cindy Wilson and Linda Lubitz did not create a hostile work environment or rise to the status of actionable race discrimination.

The Judge also notes that even if the racial slurs constituted actionable race discrimination, liability would not be fixed against an employer unless the employer knew of the racial slurs and failed to take remedial action. Continental Can Company v. State of Minnesota, 297 N.W.2d 241, 247 (Minn. 1980). Where an employer takes timely and adequate action, demonstrating that the employer discourages such discriminatory statements, no prima facie case of race discrimination has been shown. Minneapolis Police Department v. Minneapolis Commission on Civil Rights, 402 N.W.2d 125 (Minn. App. 1987), affirmed, 425 N.W.2d 235 (Minn. 1988). The record establishes that Seagate took effective and prompt action to discourage the racial slurs.

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Differential Treatment based on Race

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Brenda Fears claims that she was subject to harsher discipline by Conn Hemmesch because of her race. To establish by circumstantial evidence a prima facie case of race discrimination based on harsher discipline, Complainant must establish the following:

1. That she is a member of a protected class;
2. That she was disciplined;
3. That the discipline imposed was harsher than that imposed on comparably situated non-blacks.

Wilmington v. J. I. Case Co., 793 F.2d 909, 915 (8th Cir. 1986); Williams v. Metropolitan Waste Control Commission, 781 F.Supp. 1424 (Minn. 1992); Shannon v. Ford Motor Co., 72 F.3d 678 (8th Cir. 1996). On this issue, the Judge believes that it is a close call as to whether Complainant has established a prima facie case. Ms. Fears' principal problem is identifying similarly situated co-workers. After consideration however, the Judge is persuaded that Brenda Fears has established a prima facie case on this issue for two reasons. First, Ms. Fears was the only employee to receive a written warning because of a traveler error; and second, this record establishes that Brenda Fears was subject to close observation by Conn Hemmesch (and there is no similar close observation of co-workers). Therefore, Seagate must articulate legitimate nondiscriminatory reasons for the differential treatment of Ms. Fears by Conn Hemmesch.

The Judge believes that Seagate has articulated legitimate nondiscriminatory reasons for Complainant's discipline. Conn Hemmesch had documentable reasons for the disciplinary actions he gave Brenda Fears. On the basis of this record, the Judge concludes that Conn Hemmesch, although a zealous enforcer, took all of his actions based on circumstances that merited some form of counseling or discipline. Conn Hemmesch's aggressive approach to supervision apparently is inconsistent with the corporate "supervisory culture" at Seagate. However, there is no evidence that Conn Hemmesch's different kind of supervisory behavior was reserved only for Brenda Fears or other minority employees. Complainant has failed to show that Seagate's legitimate nondiscriminatory reasons are a pretext masking illegal race discrimination by Conn Hemmesch.

Failure to Promote

Ms. Fears also claims that Seagate discriminated against her based on her race when the Company failed to promote her to various positions that she applied for. To raise a presumption of discrimination in failure-to-promote cases, a plaintiff must show that (1) she is a member of a protected group; (2) she was qualified and applied for a promotion to an available position; (3) she was rejected; and (4) similarly situated employees, not part of the protected group, were promoted instead. Patterson v. McLean Credit Union, 491 U.S. 164, 186-87 (1989); Marzec v. Marsh, 990 F.2d 393, 395-96 (8th Cir. 1993).

The Judge believes that Brenda Fears failed to establish a prima facie case with respect to this issue. According to the selection criteria policy used by Seagate she either was not qualified because of her performance rating or the employees that were promoted were substantially more qualified than Ms. Fears.

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Reprisal

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Ms. Fears argues that Seagate engaged in a reprisal against her because she complained about the racial slurs uttered by Linda Lubitz in violation of Minn. Stat. § 363.03, subd. 7. Subdivision 7 provides in relevant part as follows:

It is an unfair discriminatory practice for any employer . . . to intentionally engage in any reprisal against any person because that person:

(1) opposed a practice forbidden under this chapter . . .

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in activities listed in clause (1) or (2): refused to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status . . .

The McDonnell Douglas burden-shifting scheme for analyzing discrimination claims applies to claims of reprisal or retaliation. Hubbard v. United Press Intern. Inc., 330 N.W.2d 428, 444 (Minn. 1983). Ms. Fears has the initial burden of establishing a prima facie case of reprisal. To establish a prima facie case of reprisal or retaliation, an employee must establish:

- (1) statutorily-protected conduct by the employee;
- (2) adverse employment action by the employer; and
- (3) a causal connection between the two.

Once the prima facie case is established, the burden of production shifts to Seagate to show some legitimate, nondiscriminatory reason for the reprisals. If Seagate meets this burden, Ms. Fears has the opportunity to show that Seagate's presumptively valid reasons are in fact a pretext for obscuring discrimination. Hubbard v. United Press Intern. Inc. at 444-45 and Giuliani v. Stuart Corp., 512 N.W.2d 589, 593-94.

The Judge believes that Brenda Fears has established a prima facie case of reprisal arising out of her transfer from Station 2 to the Final Visual Area. Specifically, the Judge finds that she engaged in statutorily protected conduct; that there is a temporal connection between the two by virtue of the transfer occurring within the same week that Linda Lubitz was disciplined, and that the transfer resulted in an adverse personnel action by the employer because Ms. Fears came under the supervision of Conn Hemmesch, a highly demanding supervisor.

However, the Judge also concludes that the move of Brenda Fears and her work station was for legitimate business reasons. Seagate's engineers determined that it was necessary to move the pattern verification function performed by Brenda Fears to a later stage in the process (Final Visual) to remedy defects and prevent erroneous shipments. Complainant has failed to show that Seagate's proffered reason for the transfer is pretext for illegal discrimination.

Sexual Harassment

Brenda Fears also alleges that Seagate committed unlawful sex discrimination. She alleges that she was subject to unwelcome sexual advances and comments from Conn Hemmesch. The elements of a prima facie case of sexual harassment is established by showing that:

- (1) The employee is a member of a protected class;
- (2) The employee was subjected to unwelcome sexual harassment;
- (3) The harassment complained of was based on sex;
- (4) The harassment affected a term, condition, or privilege of employment or created an intimidating, hostile, or offensive working environment; and
- (5) The employer is liable for the harassment that occurred based on its actual or imputed knowledge of the harassment and its failure to take appropriate remedial action.

Johnson v. Ramsey County, 424 N.W.2d 800, 808 (Minn. Ct. App. 1988); Klink v. Ramsey County, 397 N.W.2d 894, 901 (Minn. Ct. App. 1986).

Brenda Fears testified that Conn Hemmesch made the following comments to her:

- (a) "You need a good man in your life";
- (b) "You need a good man to hug you";
- (c) "Because of the new man in your life, you can't get your job done";
- (d) "You smell good";
- (e) He would eavesdrop on phone calls Brenda Fears received at work from male callers;
- (f) Comments that she "must be special since she was walked back to her work area by a male"; and

(g) "Why didn't you tell me that my pants were unzipped", while rubbing up against her.

Brenda Fears testified that the sexual advances occurred sometime between March and May of 1994. Conn Hemmesch denied that he made any sexual advances toward Brenda Fears. After consideration of this issue, the Judge concludes that Complainant has failed to establish a prima facie case for the following reasons.

She never reported any of the alleged statements or conduct of Conn Hemmesch to any management person at Seagate or to the Human Resources Department. During this time period, she had several meetings with Vicky Boyer and Dick Hora relating to her concern about racial discrimination by Conn Hemmesch. In addition, the initial correspondence to Seagate identifying Brenda Fears' concerns and complaints about her employment communicated in correspondence to Seagate do not identify the sexual advances claimed by Brenda Fears.

Because this record establishes that Ms. Fears was not shy about going to management to complain about circumstances that she believed to constitute harassment, the Judge has great difficulty believing Ms. Fears would not have also complained about the sexual advances if they had occurred. The fact that she did not complain calls into question whether the sexual advances occurred. Based on Ms. Fears own inconsistent testimony, the Judge believes that the sexual advances did not occur.

Case law on sexual harassment is similar to that which applies to racial harassment in that inappropriate, unwelcome sexual advances or comments must rise to the point of affecting a term or condition of employment to be actionable. Klink v. Ramsey County by Zacharias, 397 N.W.2d 894 (Minn. App. 1996). Foul language and vulgar behavior in the workplace do not automatically trigger an actionable claim of sex discrimination by a worker who finds such language and conduct offensive or repulsive. Id. The sexual harassment must be sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive work environment. Also similar to the law on racial harassment, liability can only be fixed against an employer for unwelcome sexual advances or comments that the employer knew, or should have known, about.

Disability Discrimination

Complainant alleges that Respondent discriminated against her on the basis of an alleged disability. Complainant has the burden of establishing a prima facie case of disability discrimination. One necessary element is an impairment which materially limits one or more life activities. Sigurdson v. Carl Bolander & Sons Co., 532 N.W.2d 225 (Minn. 1995). Brenda Fears alleges skin irritation from her mask and headaches from working on a microscope. Neither may be sufficient to establish a prima facie case of disability discrimination. See, Fahey v. Avnet, Inc., 525 N.W.2d 568 (Minn. App. 1994). Regardless of whether a prima facie case has been established this record establishes that Seagate made efforts to accommodate her skin irritation and optical

problems. On this basis, the Judge does not believe that Brenda Fears has established illegal disability discrimination.

^[1] For ease of reference, this Report will use the words "manufactured components" rather than the name of any specific component.